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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/661,292	09/12/2003	Harrison Robert Murphy	2138.001B	7437
23405	7590	03/18/2008	EXAMINER	
HESLIN ROTHENBERG FARLEY & MESITI PC			CONLEY, FREDRICK C	
5 COLUMBIA CIRCLE			ART UNIT	PAPER NUMBER
ALBANY, NY 12203			3673	
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**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	<b>Application No.</b>	<b>Applicant(s)</b>
	10/661,292	MURPHY ET AL.
	<b>Examiner</b> FREDRICK C. CONLEY	Art Unit 3673

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If no period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED. (35 U.S.C. § 133).

Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### **Status**

- 1) Responsive to communication(s) filed on 12 December 2007.
- 2a) This action is FINAL.      2b) This action is non-final.
- 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### **Disposition of Claims**

- 4) Claim(s) 3.22-26,28-30,34,39-42,45 and 48-67 is/are pending in the application.
  - 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) Claim(s) \_\_\_\_\_ is/are allowed.
- 6) Claim(s) 3.22-26,28-30,34,39-42,45 and 48-67 is/are rejected.
- 7) Claim(s) \_\_\_\_\_ is/are objected to.
- 8) Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### **Application Papers**

- 9) The specification is objected to by the Examiner.
- 10) The drawing(s) filed on \_\_\_\_\_ is/are: a) accepted or b) objected to by the Examiner.
 

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### **Priority under 35 U.S.C. § 119**

- 12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
  - a) All    b) Some \* c) None of:
    1. Certified copies of the priority documents have been received.
    2. Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
    3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### **Attachment(s)**

- 1) Notice of References Cited (PTO-892)
- 2) Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) Information Disclosure Statement(s) (PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_\_
- 4) Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_\_
- 5) Notice of Informal Patent Application
- 6) Other: \_\_\_\_\_

***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 3, 22-26, 28-30, 34, 39-42, and 48-67 are rejected under 35 U.S.C. 103(a) as being unpatentable over U.S. Pat. No. 6,718,583 to Diaz in view of U.S. Pat. No. 4,794,037 to Hosoda et al., U.S. Pat. No. 3,493,980 to Haller, and further in view of U.S. Pat. No. 3,956,783 to Stroller.

Claims 3, 28-30, 51-53, 55-58, 60, 62, Diaz discloses an open flame resistant mattress comprising a fire barrier textile at least partially enclosing a core comprising a foam material, said fire barrier textile is defined by two distinct fabric layers: (1) a fire barrier fabric layer 20 and (2) a thermally insulating fabric layer 14, said fire barrier fabric layer comprising at least one char-forming flame-retardant fiber or a combination thereof, such as an arimid fiber having a weight range of 2 to 5 oz. per square yard (col. 3 lines 34-50). Diaz fails to disclose the thermally insulating layer having one char-forming flame retardant fiber. Hosoda discloses a fabric having at least one char-forming flame retardant fiber, such as flame retardant viscose fibers (col. 2 lines 43-55). It would have been obvious for one having ordinary skill in the art at the time of the invention to employ a flame retardant fiber as taught by Hosoda (col. 2 lines 43-45) in order to impart a high level of flame proofness to the thermally insulating later of Diaz.

Diaz also fails to disclose an outermost decorative fabric layer. Haller discloses a mattress having an outermost decorative fabric layer (12,14,16) with upholstery layers disposed between a core and the outermost decorative fabric layer (col. 3 lines 30-54). It would have been obvious for one having ordinary skill in the art at the time of the invention to employ an outermost covering layer as taught by Haller wherein the fire barrier textile layer is disposed between the outermost layer and the core in order to provide a sanitary mattress (col. 1 lines 25-30). Diaz fails to disclose attaching the thermally insulating layer to the fire barrier layer via needle punching. Stroller discloses needle punching layers of materials together to form a mattress (col. 1 lines 1-22). It would have been obvious for one having ordinary skill in the art at the time of the invention to employ needle punching as taught by Stroller in order for the mattress to resist soiling and not absorb moisture (col. 1 lines 18-20). Diaz is silent to the fabric layer being either woven or knitted. It is considered an obvious modification to employ well known manufacturing methods such as a fabric being woven or knitted and it would have been obvious to employ one of the manufacturing methods in order to provide a means to combine the combination of fibers to form a fabric layer. Furthermore, determination of patentability is based on the product itself. The patentability of a product does not depend on its method of production. If the product in the product-by-process claim is the same as or obvious from a product of the prior art, the claim is unpatentable even though the prior product was made by a different process.

Claims 39-41, Diaz, as modified, discloses all of the Applicant's claimed limitations except for the mattress meeting the smoldering resistance standard, resisting an open flame under conditions of California TB 117, and California TB 603, wherein the mattress has a maximum heat release of less than 200 kW and a total energy release of less than 25 MJ in the first ten minutes of the test. It would have been obvious for one having ordinary skill in the art at the time of the invention to have the mattress resist an open flame under conditions as stated above in order for the mattress of Diaz to meet the standards for institutional mattresses sold in the State of California.

Claims 22-25, 34, and 42, Diaz discloses an open flame resistant mattress comprising a fire barrier textile at least partially enclosing a core of said mattress, said fire barrier textile is defined by two distinct fabric layers: (1) a non-woven fire barrier fabric layer 20 and (2) a thermally insulating fabric layer 14 comprised of a nylon fabric, said fire barrier fabric layer comprising at least one char-forming flame-retardant fiber, such as an arimid fiber (col. 3 lines 34-49), wherein said fire barrier fabric layer is attached to said thermally insulating fabric layer by stitching (col. 3 lines 34-44). Diaz fails to disclose the thermally insulating layer having one char-forming flame retardant fiber. Hosoda discloses a fabric having at least one char-forming flame retardant fiber, such as flame retardant viscose fibers (col. 2 lines 43-55). It would have been obvious for one having ordinary skill in the art at the time of the invention to employ a flame retardant fiber as taught by Hosoda (col. 2 lines 43-45) in order to impart a high level of flame proofness to the thermally insulating later of Diaz. Diaz fails to disclose the

mattress resisting an open flame under conditions of California TB 117. It would have been obvious for one having ordinary skill in the art at the time of the invention to have the mattress resist an open flame under conditions as stated above in order for the mattress of Diaz to meet the standards for institutional mattresses sold in the State of California.

With regards to claim 26, Diaz, as modified, discloses all of the Applicant's claimed limitations wherein the thermally insulating fabric layer comprises a blend of flame retardant viscous and other fibers (Hosoda)(col. 2 lines 43-55). Diaz fails to disclose employing modacrylic fibers. It is considered obvious to choose from a plethora of known materials for use in bedding and it would have been obvious for one having ordinary skill in the art at the time of the invention to employ a modacrylic fiber in order to provide the blended fiber product as taught by Hsoda (col. 2 lines 48-50).

Claim 48-49, Diaz, as modified, discloses all of the Applicant's claimed limitations according to claim 31, wherein Diaz illustrates that it is well known to employ a mattress foundation with the mattress (fig. 4). It is well known that upholstery is employed over the cores of mattresses and mattress foundations such as box springs and it would have been obvious for one having ordinary skill in the art at the time of the invention to employ a fire barrier textile over the mattress foundation in order to provide a fire retardant foundation.

Claim 50, 59, and 61 Diaz, as modified, discloses the open flame mattress, wherein Diaz further discloses that it is well known to employ fiberglass within a fire barrier fabric layer (col. 3 lines 37-39).

Claims 54 and 63-67, Diaz, as modified, discloses all of the Applicant's claim limitations except for the thermally insulating layer comprising flame retardant rayon. Hosoda discloses the use of flame retardant rayon (col. 2 lines 59-62). It would have been obvious for one having ordinary skill in the art at the time of the invention to employ flame retardant rayon as taught by Hosoda in order to provide an alternative flame proof material.

#### ***Response to Arguments***

Applicant's arguments filed 12/12/07 have been fully considered but they are not persuasive. It appears that the Applicant's assertion of distinction between the present invention and the prior art of record is based upon the selection of known materials for either the fire barrier fabric or the thermally insulating fabric. However, it has been well established that merely selecting from a plethora of known materials is considered an obvious modification and is within the knowledge of one skilled in the art to merely select from the plethora of known and equivalent materials for the purpose of providing alternative materials for a fire barrier fabric layer or the thermally insulating layer that would yield predictable results in constructing a flame retardant mattress. Therefore, the selection of different materials or the combination thereof in constructing a mattress is not a novel concept.

As stated above, Diaz is silent to the fabric layer being either woven or knitted. It is considered an obvious modification to employ well known manufacturing methods such as a fabric being woven or knitted and it would have been obvious to employ one of the manufacturing methods in order to provide a means to combine the combination of fibers to form a fabric layer. Furthermore, determination of patentability is based on the product itself. The patentability of a product does not depend on its method of production. If the product in the product-by-process claim is the same as or obvious from a product of the prior art, the claim is unpatentable even though the prior product was made by a different process.

***Conclusion***

**THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to FREDRICK C. CONLEY whose telephone number is 571-272-7040. The examiner can normally be reached on M-TH.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, PATRICIA L. ENGLE can be reached on 571-272-6660. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

/FREDRICK C CONLEY/  
Examiner, Art Unit 3673